

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RAFAEL DIAZ,
Petitioner,

CASE NO. 10-10352
(CRIMINAL CASE NO. 99-80241)
HONORABLE PATRICK J. DUGGAN

v.

UNITED STATES,
Respondent.

**ORDER DENYING CERTIFICATE OF APPEALABILITY AND LEAVE TO
APPEAL IN FORMA PAUPERIS**

Petitioner Rafael Diaz filed a *pro se* petition for a writ of habeas corpus on January 26, 2010, which this Court dismissed on June 2, 2010. Petitioner seeks to appeal the Court's decision and therefore requests a certificate of appealability. *See* 28 U.S.C. § 2253. Petitioner also seeks leave to proceed on appeal *in forma pauperis*.

Section 2253 provides that a certificate of appealability may issue only if a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a district court denies habeas relief on procedural grounds without reaching the petitioner's constitutional claims, a certificate may issue if the petitioner shows that jurists of reason would find it debatable whether (1) the petition states a valid claim of a denial of a constitutional right; *and* (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484-85, 120 S. Ct. 1595, 1604 (2000).

In his habeas petition, Petitioner did not designate the statute pursuant to which he was seeking relief. He specifically informed the Court, however, that he did not want his

petition construed as a motion pursuant to § 2255—presumably to avoid having his petition treated as a second or successive motion.¹ The Court therefore construed Petitioner’s request for habeas relief as an application pursuant to 28 U.S.C. § 2241 and concluded that he was not entitled to relief pursuant to that section because he failed to allege that the remedy afforded under § 2255 is inadequate or ineffective. As the Court further noted, a § 2241 motion must be filed in the court having jurisdiction over the prisoner’s custodian which, in Petitioner’s case, is a district court in Kentucky.

Petitioner fails to establish that the Court’s procedural ruling with respect to his § 2241 motion was incorrect. The Court therefore holds that he is not entitled to a certificate of appealability and DENIES the request. The Court further holds that any appeal would not be taken in good faith and accordingly DENIES Petitioner’s request for leave to proceed *in forma pauperis*.

SO ORDERED.

DATE: **July 16, 2010**

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
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¹Petitioner previously filed motions under 28 U.S.C. § 2255. This Court denied the first motion on the merits on December 17, 2003, and transferred his second petition to the Sixth Circuit pursuant to 28 U.S.C. § 1631 which the appellate court dismissed on December 8, 2009 for want of prosecution due to Petitioner’s failure to cure a defect.